

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

REGIONAL TRANSPORTATION  
PROGRAM, INC.

Employer

and

AMALGAMATED TRANSIT UNION,  
LOCAL NO. 714, AFL-CIO

Petitioner

Case 1-RC-22002

[\[1\]](#)

**DECISION AND DIRECTION OF ELECTION**

The Employer is a non-profit agency, operating out of its 127 St. John Street, Portland, Maine facility, providing transportation services to a variety of clients, who are generally people with disabilities, seniors, low income people, people in wheelchairs, and people undergoing dialysis treatment. The Petitioner seeks to represent a unit consisting of five dispatchers (also

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referred to as operations supervisors and senior operations supervisors ) and five office workers employed at the Employer's Portland facility. The Petitioner currently represents 42 drivers and three mechanics, including a lead mechanic, employed by the Employer at this

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facility. The Employer, however, maintains that the five operations supervisors are supervisors within the meaning of the Act, and that two of the office workers are confidential

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employees, and, accordingly, that these seven employees should be excluded from the unit. The parties stipulated that the remaining three clerical employees are appropriately included in

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the petitioned-for unit. I find that the Employer has not met its burden of showing that the operations supervisors are supervisors within the meaning of the Act, or that the office assistant and the financial assistant are confidential employees, and I will, therefore, include them in the unit.

## **Background**

As indicated above, the Employer provides transportation services out of its Portland facility to a diverse group of approximately 1,100 people a day. These individuals are generally unable to use Portland's regular transit system, usually because of disabilities. The Employer's clients include children with special needs, such as those with cerebral palsy or cognitive disabilities, who need transportation to day [re]habilitation programs. The Employer also provides non-emergency medical transportation for Medicaid clients. The Employer is legally considered by the Department of Transportation to be a mass transit service, meaning that while the general public has access to its service, it is not normally used that way. The Employer does provide some commuting services, however. It provides a commuter run between Portland and Bath Iron Works in Bath, Maine, which is about 25 miles from Portland.

There are 63 employees, including the 42 represented drivers, working in the Portland facility, and anywhere between 30 and 40 volunteer drivers, who perform many of the same tasks as the regular drivers. In performing its operations, the Employer has 33 vehicles in its fleet, including vans, buses, caravans (small vans), and two large passenger busses. All these vehicles are equipped with special lift equipment and tie-downs. The Employer's drivers generally drive established routes. There are occasions when American with Disabilities Act riders (ADA riders), who need door-to-door service, call in the day before to arrange a ride. These riders must make a reservation the day before and then they are assigned to an existing route. The Employer has drivers working from 5:00 a.m. until 10:00 p.m., Monday through Friday. It also operates on the weekend, though this is on a much smaller scale. It is open on Saturdays from 6:00 am until about 5:00 or 6:00 p.m. and on Sunday from 10:00 a.m. until about 7:00 p.m. There are only two drivers working on Saturday and one driver on Sunday. Since 2003, the Employer has used a computer system to do its scheduling and dispatching. The operations supervisors and senior operations supervisors are trained on and use this system, but they also make numerous manual changes as well.

## **The Employer's Organizational Structure**

Jon McNulty is the executive director of the Employer and has held that position since October

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1995. The Employer's operations are divided into two branches. The director of finance and administration, Jack DeBeradinis, heads one branch, and the director of services, Chuck Baker, heads the other. The functions performed in the finance and administration branch include central accounting functions and financial activities. The petitioned-for clerical employees, including the two disputed clerical employee positions of office assistant, held by Kathryn Kelley, and financial assistant, held by Eileen Currier, are in this branch. The accounting and systems manager, Cindy Gilson, a stipulated supervisor, and the office assistant, Kelley, report directly to DeBeradinis, although Kelley also reports to Gilson. Also reporting to Gilson are the financial assistant, Currier, the billing financial assistant, the billing and data specialist, the family coordinator, and the pass desk/data entry clerk.

The Employer's operations and its maintenance activities are performed in the branch overseen by the director of services, Chuck Baker. The operations manager, Vaughn Carver, and the lead mechanic report directly to Baker. The five operations supervisors, the bus/van drivers, the volunteer drivers, the lead mechanic, and the mechanics report to Baker through the operations manager, Carver.

### **The Confidential Employee Issue**

#### **1. The Office Assistant**

McNulty testified that the executive director, the director of finance and administration, and the director of services are responsible for formulating, determining, and effectuating management policies in the field of labor relations. More specifically, the three of them sit together and prepare for negotiations with the Union concerning the driver and mechanics by looking at the Employer's financial position, ability to acquire capital equipment, and its staffing issues, and generally develop a plan to use when they sit down together with the Union and begin to negotiate a contract. All three work together in developing management proposals. McNulty stated, without offering specific examples of assistance, that they are assisted in these tasks by the office assistant, Kelley.

Kelley has been the office assistant for three years. Her work location is essentially in the reception area. She sits immediately to the right of the Employer's entrance in the same office area and steps away from McNulty, DeBeradinis, and Gilson. Currier, the financial assistant; Perkins, the billing and data specialist; Carroll, the family coordinator; and Baker, the director of services, also have offices in this area in the corridor to the left of Kelley. McNulty, DeBeradinis, and Gilson all testified that they take steps to make sure what they are personally responsible for is kept confidential by doing such things as locking desks and offices and closing the door when meetings are taking place between directors and/or managers.

Kelley is an hourly employee who greets the customers, answers the phones, and opens the mail. She also helps out at the bus pass desk and does the criminal and license checks on new employees. Kelley explained that while she used to type up the minutes of the Employer's executive board meetings, as of November 2005, she ceased doing that task. Regarding her mail opening function, Kelley explained that she does not open anything marked confidential or from Occupational Health and Rehab, the Employer's provider for drug testing and for physical therapy, or from MIMC, which is related to the Employer's worker's compensation; she simply

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distributes the envelope. When Kelley opens legal invoices she puts them in Currier's box.

Kelley files mail and documents, including some documents considered confidential by the

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Employer. These documents include memos, letters, and documents related to grievances with the Union. Kelley has access to information considered confidential by the Employer by virtue of the fact that she has access to the Employer's filing system and the records kept there. These files are located outside McNulty's door, and only Kelley and McNulty have keys to access those

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files, although the files are not always locked. McNulty testified about documents Kelley has access to concerning grievances filed by the Union because of her filing work. One such grievance was filed in 2004 and concerned accommodating an employee returning from a medical leave. The grievance is still pending, and, over the course of the grievance processing, Kelley has had access to the employee's medical records and correspondence from labor counsel concerning this grievance. There was an additional grievance McNulty recalled when an operations supervisor was terminated, and Kelley had access to, and did, in fact, access information that management was keeping confidential from other employees concerning that grievance. There are also files to which Kelley does not have access. For example, the personnel files are kept in Gilson's office, and McNulty and DeBeradinis have files in their own offices that Kelley does not have access to.

According to the Employer witnesses, Kelley has access to financial information the Employer considers confidential as well. This information includes budget material she has access to when she puts together the documents for a board of directors meeting, which includes the financial report drafted by DeBeradinis, the director of finances. According to Kelley, however, DeBeradinis simply asks Kelley to prepare the envelopes for the board meeting, which she does, and he fills the envelopes and brings her the filled envelopes for her to seal and mail. Kelley does not maintain the budget material and she does not attend board meetings. DeBeradinis prepares a

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packet for her to put in the board book. Kelley used to type up management revisions to the minutes of board meetings, but, as indicated above, has not done so since November 2005, and

apparently will no longer be doing so, since the Employer has hired an employee named Annie Wadleigh to be in charge of the minutes.

An additional job responsibility Kelley is required to do is to perform background checks on newly hired employees. Kelley has a password she uses enabling her to use the computer for

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two of the three checks she performs. Kelley accomplishes these checks by sending out documents seeking the information from the appropriate state agencies. These are generic forms that Kelley sends out and that the agencies fill out and return to the Employer. Kelley is responsible for making sure that the applicant provides authorization, that the documents get filled out and sent off to the right place, and that the responses, which the Employer says are confidential, are sent through Kelley, ending up with Baker if there is a problem or attached to the personnel file. Since Kelley does not have access to the personnel files, she will find out where the file is and give the information to the person with the file so that the information can be attached. Kelley has a unique e-mail address she uses to receive the information back from two of the three agencies. Unlike most e-mail addresses at the Employer, hers does not include her name. In addition to this information, Kelley also receives other e-mail at this address, such as notes from board members if they cannot attend a meeting. Kelley does not receive information about grievances or other employees at this address.

Kelley has never sat in on a meeting where labor policy decisions were made by management. Kelley does not take minutes of management meetings. About a month ago, she typed up minutes of a meeting provided to her by Baker, but she does not attend herself. Kelley does not type up collective-bargaining proposals. Kelley is also not privy to the budget drafts as they are created, but only to the final product, which she sees, according to McNulty, when she is preparing the packet for the board of directors meeting. Kelley does not respond to Union information requests.

The office assistant job description provides as the summary of responsibilities:

answers telephones and helps facilitate communications and disburse information to maintain effective relationships with individuals both within and outside the agency. Assists with clerical duties such as scheduling, filing, correspondence, data entry and maintenance of financial and personnel records. Assists with basic human resource functions.

The description notes that the office assistant reports to the accounting manager and is considered a non-exempt hourly job. Cindy Gilson, the accounting and systems manager, fills out Kelley's performance appraisal and McNulty reviews it. Kelley does not have an immediate reporting relationship to McNulty.

## 2. The Financial Assistant

As noted above, Jack DeBeradinis is the director of finance and administration. He was hired as director of finance about 12 & ½ years ago and added the administrator responsibility to his position about four or five years ago. DeBeradinis works closely with McNulty and the other Employer managers and directors. His responsibilities include overseeing accounting, budgeting, forecasting, and government grant administration. He shares personnel administration responsibilities with McNulty and handles many legal issues. He serves as an analyst and provides key support to McNulty in union negotiations.

DeBeradinis oversees the accounting and systems manager, Gilson, who, in turn, oversees the department on a daily basis. This allows DeBeradinis the opportunity to provide an overview and work with the executive director and his other director colleagues on the broad view of issues related to the Employer. He is, however, directly involved with closing the monthly financials and preparing for the annual audit. He serves as the contact person with regard to audit issues by DHR, IRS, and state government. DeBeradinis is also responsible for the monthly financial package used by the board of directors, as discussed above.

DeBeradinis and Gilson, who has worked as the accounting and systems manager for over a year, testified about the financial assistant position held by Eileen Currier, who has worked in this position for about six years. Currier receives all the invoices in the building, except for those from MIMC, which are worker's compensation related invoices, and Clark Insurance, which is the Employer's vehicle insurance carrier. Those invoices go directly to DeBeradinis. Currier then codes the invoices into a specific Employer designated category, and then gets the proper authorization by signature from the manager or director who originated the invoice. This is the way she ensures that the Employer is paying a bill it owes. She also makes sure that it is not a duplicate invoice by checking her files or accessing the computer, if she does not remember. She also checks to see if there are any credits from the vendor against the bill, and checks the accuracy of the bill to make sure that the numbers add up. Currier then enters the invoice into the Employer's MIP accounting software and creates a batch. She then brings the batches to Gilson, who releases the invoices and returns them to Currier. Currier then cuts the checks. After that,

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Currier makes a copy of the checks and posts them. Gilson then gives the checks to DeBeradinis or McNulty. Then, by the end of the week, DeBeradinis will sit with Currier and go over every paid bill. Currier does not have the authority to pay any of the invoices or to sign checks.

In doing her job, Currier has access to information concerning how much money the Employer is earning per route. She also knows how much money the Employer has coming in and how much is going out.



DeBeradinis testified that Currier creates the weekly invoices from payroll that are on the payroll register. She has to create the invoice in order to enter such things as Union dues and garnishments into the system. Her role with payroll is to make sure that all the employees have either punched in the time clock or turned in their paperwork. Currier inputs the information from the Employer's electronic system in the ADP electronic software and gets the payroll ready. Currier makes changes to increases, if they fall under the Union contract. Currier then prints out the reports for Gilson's review. Currier has access to the Employer's entire payroll, including the senior administrative staff.

Currier has access to the Employer's MIP accounting software, but there are restrictions on her access. Currier explains that, for the most part, she works in the accounts payable on the system, but she can also get into the aged receivables. In addition, she does have access to the accounts receivable schedule so that she can set up new clients for Gilson. The way this is done is, when a user enters the software, the passwords provided restrict the user at a given workstation. Currier has the highest degree of restrictions, while Gilson and DeBeradinis have no restrictions. Despite these restrictions, Currier does have access to reports and that access cannot be limited.

In addition, Currier generates a "route efficiency report" on a weekly basis and has been doing this for several months. Currier did not design this report and gets the data for this report from the Transit software, also known as the ADEP software. Currier takes the information from the Transit software and then feeds it into an Excel spreadsheet. This document shows the average hourly dollar return per day, per week, and per route. This is a way the Employer measures out its financial efficiency with regard to delivery of services. It is also important to the operational manager, in order for him to assess the most efficient way to move the greatest number of passengers. This report is then submitted to DeBeradinis, McNulty, the operations manager, and the director of services. This report was initiated by the board treasurer, and it is also included in the monthly board package. This report is considered confidential by the Employer and is used as a tool to control efficiency, though DeBeradinis does not deny showing these reports to drivers in the past. The report takes Currier about one day a week to prepare.

The financial assistant position job description was created on December 11, 1998. The description summary of responsibilities provides: "Responsible for assisting the Accounting Manager in accurate timely processing of accounts payable, data entry of RTP driver manifests, and other business office tasks." Listed as essential function number one is "Processes accounts payable: Verifies bills for payment; enters data into accounting software; prepares checks for payment."

## **Analysis**

A confidential employee is one who assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. *NLRB v.*

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*Rural Electric Corp.*; *B.F. Goodrich Co.* The Board contemplates that a confidential employee is involved in a "close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding

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this policy before it is made known to those affected by it." *Intermountain Electric Assn.* In addition, the Board has developed the alternative test that employees who have regular access to confidential information concerning the anticipated changes that may result from collective

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bargaining negotiations may be confidential employees. *Crest Mark Packing Co.* The party asserting confidential status has the burden of proving its assertion. *Intermountain Electric Assn.*

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I find that neither the office assistant, Kelley, nor the financial assistant, Currier, are confidential employees and shall include them in the unit.

First, with respect to Kelley, the Employer relies on the fact that in performing her duties, Kelley works for the Employer's senior managers who are responsible for setting labor relations policy and negotiating with the Union. The Employer primarily points to her access to confidential information, including personnel records; medical information, including information concerning a medical leave of an employee who had filed a grievance; background checks; board of directors minutes, including information concerning current and future wages; and confidential mail that is not marked confidential, including grant and audit information, and legal bills related to labor issues. It is well established, however, that mere access to confidential labor relations material such as personnel files, minutes of management meetings, strike contingency plans, departmental strategic planning, and grievance responses, does not confer confidential status. *Inland Steel*

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*Company.* Rather, confidential status is reserved for those with a role in creating the document or in making the substantive decision being recorded, or having regular access to labor relations information before the union or employees involved. Kelly is not involved in the decision-making process, and there is no evidence that she has advance access to labor relations

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information. The Employer's reliance on *Pullman Standard Division of Pullman* is misplaced. In *Pullman*, the material the confidential employees had regular access to was labor bulletins, which included management projections of the results of future contract negotiations.



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As the ALJ in *Inland Steel* explained, in *Pullman*, the employees excluded from the bargaining unit “had access to the precise terms to which the Employer would agree in a collective bargaining agreement....” That is not the case here. Kelly’s involvement in performing background checks on newly hired employees also does not render her a confidential employee. Accordingly, I find that the Employer has not met its burden of demonstrating that Kelly is a confidential employee and I will include her in the unit.

The Employer argues that Currier, who works for DeBeradinis, a high level manager who formulates labor policy, is also a confidential employee because of the work she does and because she is regularly exposed to confidential information regarding the Employer’s labor relations and financial matters. The Employer specifically relies on the efficiency report Currier generates, from which the Employer can assess whether to make changes in such things as staffing levels. I do not find this persuasive evidence, however, of her confidential status. Indeed, the Board has long held that simply having access to and compiling information, such as financial information accessible to and compiled by the employees at issue, without more, does

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not convert rank and file employees to confidential status. *Inland Steel Company*. Rather, “the Board requires that parties seeking to establish confidential status show that an employee has

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access to precise labor rates which the employer is willing to agree to in labor relations.”

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This is certainly not the case here. The Employer cites *The Bakersfield Californian* in support of its position. In that case, however, the labor information to which the secretary had access was labor strategy notes. This is far different from the kind of information to which Currier has access. Accordingly, I find that the Employer has not met its burden of demonstrating that Currier is a confidential employee and I will include her in the unit.

## **The Supervisory Status Issue**

### **The Operations Supervisors**

#### **1. The operations manager:**

The operations supervisors report to Vaughn Carver, the operations manager. The operations manager position was created five or six years ago to have a person manage the operations supervisors and also oversee the fleet. Carver works from 8:00 a.m. to 5:00 p.m., which are about the same hours as the other managers. It is Carver’s job to manage the on-road operations, which includes dispatch, customer service, client intake operations, as well as drivers

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on the road. In total, there are about 42 people working under him, including five operation supervisors and 42 drivers. In addition, Carver has responsibility for the volunteer driver

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program.

Carver provides orientation to new drivers. Carver testified that, during the orientation, he tells the drivers that the operations supervisors are their immediate supervisors to whom they should bring issues, concerns, or problems first. During this orientation, Carver provides the drivers with a detailed operations guide that is dated August 2000. The guide includes information on how drivers should act and how they should do their jobs. It also has one section called "Questions," which states that the driver supervisors are the best source of information about the job and if "you have questions or additional concerns not addressed by this guide, talk with your supervisor." According to Carver, the supervisor referred to in this section is the operations supervisor. The operations supervisors do not have any written guide on how to perform their jobs.

## 2. The operations supervisors:

The operations department includes five operations supervisors, two of whom are senior

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operations supervisors. The two senior operations supervisors, Smith and Dunphy-Pippen, have both worked for the Employer in excess of 20 years. The three other operations supervisors have held their current positions for about 19 to 20 years. The operations supervisor positions have existed since the inception of the Employer, although there have been some upgrades in the functions. To accommodate those changes, McNulty says the position titles have changed. The senior operations supervisor and the operations supervisor job descriptions were created in

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December 1998.

Operations Supervisors are hourly paid employees. They do not hire employees and are not involved in the hiring process. They do not fill out employee evaluations or fill out any employee reports. They have no role in promotion or bonus decisions. They do not attend

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management meetings and are not involved in the grievance process. They do not participate in the development of policies applicable to drivers. They do not participate in the development of corrective action procedures and they are not involved in disciplining employees. If a driver refused a route assigned to him by the operations supervisor, the operations supervisor would inform Carver and let him handle the matter.

a. Client intake

All five operations supervisors sit in the same room with a computer in front of each of them. They are all present from at least 8:00 a.m. to 1:00 p.m. during the period of time when client intake begins. Client intake is the process by which the Employer's customers call in to schedule trips. These are usually telephone calls made by the customers themselves, but can be referrals from other sources, such as a call or FAX from the human services department in a nursing home. The operations supervisors take these calls, which total anywhere from 600 to 1,000 inbound calls daily. They also make outbound calls to tell clients that the driver is outside the client's location, or to verify client information. The operations supervisors use two-way radios to be in contact with the drivers and, in this way, know when the drivers are outside the clients' locations. Sometimes a driver will call the operations supervisor to request that the client be told that the driver is there and to come outside, or that the client be notified that the driver is running late. The drivers and operations supervisors are constantly in connection on the two-way radios all day-long. The operations supervisors multi-task and can speak with an inbound client call and a driver at the same time. Operations supervisor Kendra Thibodeau testified that she spends her hours at work scheduling volunteers, answering phones, and taking reservations from clients. When a client makes a reservation, she checks their file in the computer and asks them about the appointment and when it is. She then enters all the information into the ADEP software system discussed below. Thibodeau testified that she has had no involvement in assigning overtime, drug alcohol training, emergencies (though she has heard them), sending people home early, or enforcing driver behavior under the driver operations manual.

b. Scheduling trips and making driving assignments

The ADEP system is an automated computer system which has been used by the Employer for a little over three years. The computer has the ability to retain information on the customers, the clients, and route efficiencies. The computer can schedule trips that need to be made for clients. This information can also be used in the billing process. The computer also has the ability to generate reports from the collected data. Dunphy-Pippen prints manifests from this computer

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system and gives each driver his or her daily manifest. The Employer makes approximately 1100 trips a day, and about 700 of them are scheduled in advance.

While the computer automatically schedules the routes the previous day, operations supervisors have to make manual changes to the schedule. Usually, it is Dunphy-Pippen who does this,

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because she is the first to arrive in the morning, but any operations supervisor could manually do this. The operations supervisor must manually change about 30 percent of the schedule, since

on any given day there are anywhere from 60 to 80 trips manually assigned. These changes are needed for different reasons. Some manual changes are made because when a route is full, a particular trip will go on a wait list or standby list that the Employer keeps. Eventually, these trips must be added to the routes. It is the operations supervisor's job to insert these trips into the

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already arranged routes. Operations supervisor Kendra Thibodeau testified that when an inbound call has to be handled on a stand-by basis, she will look to see if someone is available to take the call. If no one is available, she enters the client's name into the computer and the computer automatically schedules it.

The other manual changes to the schedule occur when drivers call out. On these occasions, the operations supervisor can call another driver in to cover the absent driver's shift without getting

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permission from the operations manager. When a driver calls out, because of her tenure, Dunphy-Pippen can almost instantly know whose route can be pulled to cover the called out driver's route. She and Ralph Smith, the other senior operations supervisor, who is also a long-tenured employee, can do this instantly. This requires knowing which are the more challenging routes and which drivers are best suited to deal with those routes, which drivers would become too nervous, and other similar factors. Dunphy-Pippen testified that the decisions she is making and the judgment she is using in doing her job are based upon experience. The less senior operations supervisors are becoming more familiar with the operations and learning to make these judgments quickly. When they do not know information on a client, they can review the client's master file.

When the operations supervisors make driving assignments, they take into account certain information about the drivers, including with which clients they are best suited to work. For example, there are certain drivers who are not good with children and others who are, and some drivers who do not get along with particular clients. Carver himself has been directly involved with this, telling the operations supervisors not to schedule a certain driver with children. The initials of the driver to be excluded with certain clients are included in the computer in the client information, but not in the scheduling program. Dunphy-Pippen testified that she makes driving assignments based on the size of the route. She looks at whether one driver can accomplish such a large route or whether she needs to split the route into two routes. She also takes into account whether the driver knows the area and how nervous they seem to be about a route they have never done before.

#### c. Postponing or changing routes

Operations supervisors also have authority to postpone one trip and send another trip first, if, according to Carver, in their judgment one trip is more important than another. For example, one

client is going home, but another is low on oxygen and getting a new supply. The operations supervisor would consider the importance of the two trips, driver availability, and the personalities of the available drivers before making a change. The operations supervisors check with Carver if he is available, however, before postponing a route or setting a route back to be able to take care of another route. This happens about three times a week. If Carver is not available, they make the change and notify him about it after the fact.

Operations supervisors sometimes have to cancel trips and arrange alternative transportation, such as a taxi. When doing this, they look at driver availability and client ability to be put in a taxi. The operations supervisors know about most of the clients' needs, but if they do not, they are required to review the client information first. This can be done without authority from Carver, although operations supervisor Kendra Thibodeau testified that, recently, Carver informed operations supervisors that because of the increase in taxi use, they must now receive his permission first before using a taxi for certain clients, depending on their billing codes. Thibodeau admitted that she does not always do this, however, and she has not been reprimanded for doing it.

d. Operations supervisors' role in emergencies

There are emergency situations such as accidents, fights, or medical emergencies that come up during the day about two or three times a week, or 12 to 15 times a month, that require the operations supervisors to assist the driver. In such a situation, the driver calls the operations supervisors and uses a special code called "1000." Whichever operations supervisor hears the code first deals with the emergency. The operations supervisor will clear the airways and determine what the problem is first. The operations supervisor does this by talking first to the driver and asking the driver if the driver needs an ambulance, for example. The operations supervisor leaves it to the driver's discretion and then calls the ambulance. If a client is from a group home, the operations supervisor may call the group home and ask for advice, in the case of a specific kind of medical problem, such as a seizure. There is open communication in the case of emergency. Often, the senior operations supervisor will then order all units to stand by while they determine whether rescue or police are needed. After these kinds of incidents, the operations supervisor provides the driver involved in the situation with an incident report form to be filled out by the driver and returned to Carver. There is no signature line for the operations supervisor on this form.

e. Overtime, ending shifts early, and closing the operations

Operations supervisors are authorized to incur overtime when the Employer has trips to cover and is running behind. The operations supervisors do not need to get approval before doing this, but must follow seniority when offering weekend overtime. Drivers can accept or decline

overtime; they are not assigned overtime when they do not want it.

Operations supervisors have sent drivers home before the end of their shifts when the Employer was experiencing vehicle maintenance issues and there were not enough vehicles available for the drivers to use. When this is done, the operations supervisors send drivers home based on seniority. Dunphy-Pippen recalled times when a driver would not go home even after Dunphy-Pippen sent them home. On these occasions, she will send the driver to Carver.

On page 14 of the driver's guide the Employer lists under "After Hours Communications," the names of whom to contact after hours. The names include the two senior operations supervisors, Dunphy-Pippen and Ralph Smith. Dunphy-Pippen is listed first, and it is expected that drivers will call her first. Dunphy-Pippen carries an Employer-provided cell phone for this purpose and receives several calls a week and on the weekend. The senior operations supervisors' names are followed by Vaughn Carver, Bill Wolf, Joe Powers, and Jon McNulty. That section also provides that on weeknights after 1800 hours (6:00 p.m.) and Saturday and Sunday, at least one driver will have a cell phone.

During the past season, on two occasions, both on Sundays, Dunphy-Pippen made a decision to [\[34\]](#) suspend the Employer's operations because of bad weather. Carver only learned of it when he came to work the following Monday. On these two occasions, there were ice storms, and the morning part of the route consisted of clients in wheelchairs either going to work or going to church, and later, they were only going to church. Dunphy-Pippen learned that churches were closing, and, looking at the weather and listening to the weather report, she determined that the Employer should close. According to Dunphy-Pippen, any operations supervisor could make this decision, although the evidence showed that she is the only one who has done so. If bad weather situations come up during the week, Carver makes these kinds of decisions.

#### f. Vacation and sick leave

Drivers make vacation and sick leave requests to Dunphy-Pippen, who then checks the calendar to see what the coverage is and, depending on coverage, will then either approve or deny the

[\[35\]](#) request. The Employer has vacation bids twice a year. The approved weeks are then put on the calendar. If, after that, a driver wants leave, they tell Dunphy-Pippen, or Ralph Smith in her

[\[36\]](#) absence, that they want the week they are seeking off. If there are already three drivers out, Dunphy-Pippen will generally tell the driver that there are too many drivers out already, so they cannot take vacation. In fact, the calendar has a note on the bottom of it that says no more than three drivers off per week. This notation was added after Dunphy-Pippen suggested to Carver



that the Employer not allow more than three full-time drivers off in one week, and he agreed and put the sign up based on this. If it is a close call, when two or three drivers are off, Dunphy-Pippen may look to which routes are affected. If there is no problem with the driver's vacation request, Dunphy-Pippen will sign her name and put the driver's name on the calendar before she

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passes up the form to Carver. If she denies the request, she explains to the driver there are too many people out, but she gives the request to Carver. Carver gets all the requests and has to approve them, though he does not overrule the vacation requests that have been granted. He has, however, according to Dunphy-Pippen, overruled her decision not to grant vacation about 99.5 percent of the time, and the drivers know that. On those occasions, Dunphy-Pippen will say to Carver that they cannot afford to have the driver off and Carver replies that they are going to let

[38]

the driver have it off. Carver testified that if Dunphy-Pippen denies the request, the form will normally be returned to the driver and Carver gets a copy of it.

g. Additional considerations

The operations supervisors are also referred to as dispatchers, and, apparently, this is because, under certain circumstances, it is easier for people to understand what is expected of the job if it is referred to as a dispatcher. For example, when the Employer advertises the position, if it uses the operations supervisor title, people may think that it is a bigger job than it is, so in those situations the Employer uses the more common title of dispatcher.

Senior operations supervisor Dunphy-Pippen testified that she supervises drivers, but later

[39]

clarified that her supervision of the drivers is limited to their route assignments. Dunphy-Pippen will speak to individuals asking to speak to a driver supervisor if she is the only one there to take the call.

A recent evaluation of Dunphy-Pippen, dated October 7, 2005, is in evidence. The evaluation lists Dunphy-Pippen's position as dispatcher and was filled out by Carver. The evaluation concerns Dunphy-Pippen's regular dispatch duties and her route scheduling responsibilities. There were two parts of the evaluation that were left blank because the form indicates those sections are for managers only. The two blank sections are entitled planning and implementation,

[40]

and judgment/decision making skills.

The Employer has a drug testing plan, since it is required to have one by the Federal Transit Administration and the Department of Transportation in Maine. McNulty oversees the drug testing program. The program includes random testing, pre-employment, post accident, and

reasonable suspicion testing. Operations supervisors are to attend an approved workshop in order [\[41\]](#) to handle this responsibility. The Employer also trains its operations supervisors concerning the reasonable suspicion testing. According to McNulty, the operations supervisor does not have to check with anyone before deciding that someone should undergo reasonable suspicion drug testing, but the practice indicates that the operations supervisor does, in fact, do so. For example, on the one occasion when McNulty knew that an individual was referred, Dunphy-Pippen brought it to the attention of Baker, the service director, who decided that it was not necessary to test the individual.

Dunphy-Pippen testified that she is not really sure what reasonable suspicion testing is, although she remembers attending the one-day training. Dunphy-Pippen recalled the driver about whom McNulty testified. Regarding this driver, there was more than one occasion when she had reason to question his sobriety. On the first instance, this driver, who was scheduled to arrive within moments, called her several times within a half hour. On the last occasion, she asked him if he had been drinking, since his speech was slurred and he kept calling to ask the same question. Dunphy-Pippen asked him if he had been drinking, and, although he denied it at first, he called back and admitted that he had and asked her what he should do. She told him to call back in two hours when Carver was due to report. Dunphy-Pippen says she told him that and did not suggest he come to work first before talking to Carver, since she would never have anyone go out and drive the Employer's vehicles drunk. The second instance with this same person was when Dunphy-Pippen noticed his speech was slurred and he smelled like he was covering up a smell. Dunphy-Pippen told Carver about this. The third instance, when this same driver was about to be on the clock, Dunphy-Pippen told Carver about it, but she was leaving her shift and was not involved further in that. Operations supervisors are not involved in random testing unless they are the ones being tested.

As previously indicated, operations supervisors have been “promoted” from the driver position, as was true with Dunphy-Pippen. Cheryl Doherty was also promoted from the driver to operations supervisor position. According to Carver, during a transition period when Doherty was still driving but also helping out in dispatch, the Union complained that she was supervising drivers and telling other Union members what to do. The Employer addressed this complaint by limiting some of her responsibilities and had her focus more on the client intake operation, since she was learning it at that time. Doherty no longer told drivers where to go and what to do. She also no longer made drivers stay late. Instead, she would defer to one of the other operations supervisors. After that time, Doherty was promoted to operations supervisor and worked on a part-time basis. On June 10, 2005, Doherty apparently attended a one- day seminar entitled “Assertive Leadership Skills: A One Day Seminar for Managers & Supervisors” to “learn to take charge and get the job done...and earn respect, loyalty, and admiration along the way.”

### 3. The Employer's position:

Carver testified that operations supervisors and senior operations supervisors share certain duties with respect to their relationship to the drivers. He stated that both operations supervisors and senior operations supervisors dispatch drivers, rearrange drivers' routes, schedule the drivers, and [\[42\]](#) make adjustments to routes if there is a change in operations during the day. He further testified that the basic difference between the two classifications is in how the two classifications relate to each other and not how they relate to the drivers. The only example of this he offered was that the senior operations supervisors help coordinate the operations supervisors' schedule during the day, should there be a need to change breaks or if people leave early, although there was no specific evidence presented of this actually happening.

### Analysis

Pursuant to Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status.

[\[43\]](#)

*Chicago Metallic Corp.* The status of a supervisor under the Act is determined by an [\[44\]](#) individual's duties, not by his title or job classification. *New Fern Restorium Co.* The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v.*

[\[45\]](#)

*Kentucky River Community Care* The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals

[\[46\]](#)

from the protection of the Act. *Quadrex Environmental Co.*

I conclude that the Employer has failed to meet its burden of proving that the operations supervisors are supervisors within the meaning of the Act. At the outset, I note that the operations supervisors have no authority to hire or fire employees, promote, discipline, reward, lay off, or recall employees, or to adjust grievances. As discussed below, I find that the record does not demonstrate that the operations supervisors use independent judgment in assigning or directing work.

For the most part, the drivers' routes are set and the schedules are coordinated by the computer. The operations supervisors do manually assign some of the routes to the drivers, but not every act of assignment or direction makes an employee a supervisor. The manual changes that the operations supervisors make are to already established routes and, for the most part, drivers drive the same route. The operations supervisors do not have the authority to permanently add routes

[47]

or to call in additional drivers, other than to replace a sick driver. The fact that the dispatchers, and in particular Dunphy-Pippen, assign drivers routes based on the difficulty of the route, the driver's familiarity with the route, the experience level of the driver, the driver's temperament, and known personality conflicts, some of which Carver identifies and all of which are recorded in the client's file, do not, in this case, demonstrate the exercise of independent judgment, since this is not the kind of discretion that requires the use of independent judgment. When an operations supervisor makes assignments based on these kinds of factors, he is engaging in a routine, clerical function which requires only common sense considerations. *NLRB\_v.*

[48]

*Meenan Oil Co.*, (where the court, in discussing oil and service dispatcher classifications, stated that "allocation and coordination of labor is the entire function of the Company's dispatchers. But their decision-making is directed and circumscribed by clearly established Company policy and they exercise no authority that transcends the routine or clerical, or that

[49]

requires the use of independent judgment."). See also *Clark\_Machine Corp.* Although the operations supervisors job is complex and may indeed require a high level of skill and experience, it does not involve the exercise of independent judgment in any one of the indicia of

[50]

supervisory authority enumerated by the Act. See also *Ten Broeck Commons*.

There was evidence that operations supervisors offer drivers overtime and have drivers leave early when there are insufficient vehicles, but no independent judgment is used concerning these assignments either. Regarding the overtime decision, the operations supervisor uses common sense to decide if it is needed. For example, if the operations supervisor knows there are clients waiting to be picked up, obviously overtime is needed. Regarding how to assign the overtime, there is no need to use independent judgment, since this is governed by the drivers collective-bargaining agreement. Common sense also dictates the decision to send drivers home when there

[51]

are no vehicles for them to drive. The situation here is similar to that in *B.P. Oil, Inc.*, in which the Board affirmed the ALJ in finding the dispatchers not to be supervisors where they requested drivers to work overtime and transferred them from one function to another on the basis of driver seniority, where the decision to request overtime or transfer was based on customer need or other common sense considerations, and where admitted supervisors rather than

dispatchers determined the number of drivers needed on a given day.

I do not find that the operations supervisors responsibly direct the drivers. Rather, the record shows that the drivers attend their own training with Carver and are given a detailed manual at [\[52\]](#)

that time concerning the Employer's operations and what is expected. The drivers are expected to be competent in their jobs before they begin working, and if they are not competent, the operations supervisor defers the matter to Carver. Thus, when an operations supervisor provides the driver with his manifest, the driver knows what to do. Where an employee has been preassigned a set of tasks, it is not supervisory authority for an employee to ask another employee to do those tasks that were already assigned to him or her. *Western Union Telegraph Company*. [\[53\]](#)

The Employer argues that the operations supervisors are sufficiently in charge of the drivers so that they must be responsibly directing them. The Employer claims that it is the job of the operations supervisors to make sure that the drivers are performing responsibly and safely, yet this is not what the evidence showed. Rather, it appears the drivers are in constant communication with the operations supervisors, but that these communications concern such things as locating a client's whereabouts or drivers reporting that they are running late. The operations supervisor is not directing the driver on how to perform the job. Instead, Carver is in charge of training and, should there be a problem, the operations supervisors involve Carver.

The fact that the operations supervisors may be trained in drug testing does not change the nature of the relationship between the operations supervisors and the drivers. In fact, the evidence showed that the operations supervisors do not have the authority to refer an employee to testing on their own. Rather, as with other disciplinary matters at the Employer, if an operations supervisor suspects a driver is using drugs or alcohol, they must involve Baker or Carver, who may or may not follow the operations supervisor's recommendation for testing. Indeed, on the one occasion that an operations supervisor did recommend testing, this recommendation was not [\[54\]](#) followed.

Regarding Dunphy-Pippen's weekend and off-hours role, it appears that she is acting in her usual capacity at these times as an operations supervisor. Accordingly, the calls she takes are generally operations supervisor calls, asking her such things as where a certain client is. Even assuming she was considered the "weekend supervisor," that title without other indicia of supervisory status



[55]

would not be sufficient to render her a supervisor. *Wilshire at Lakewood*. Regarding Dunphy-Pippen's closing the facility on two snow days, this, too, does not confer supervisory status. Rather, it appears that the decision was one of common sense, much like sending an intoxicated driver home. On both occasions, the few clients the Employer was transporting were in wheelchairs, most of the clients were going to church, and there was so much ice on the ground that the churches were closing.

The Employer asserts that the operations supervisors' supervisory status is supported by the ratio of supervisors to drivers and because operations supervisors serve as the on-call supervisor after hours. The Board has held that unless an individual possesses one or more of the statutory indicia, the existence of this kind of secondary indicia cannot transform an employee into a

[56]

[57]

statutory supervisor. *Northcrest Nursing Home*. *North Shore Weeklies, Inc.*

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular operations supervisors, including senior operations supervisors and office workers, but excluding all other employees, drivers, managers, guards, and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the



election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by Amalgamated Transit Union, Local No. 714, AFL-CIO.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior*

[58]

[59]

*Underwear, Inc.*; *NLRB v. Wyman-Gordon Co.* Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. *North Macon*

[60]

*Health Care Facility.* In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before May 15, 2006. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by

May 22, 2006. You may also file the request for review electronically. Further guidance may be found under E-Gov on the National Labor Relations Board web site: [www.nlrb.gov](http://www.nlrb.gov).

/s/ Rosemary Pye

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Rosemary Pye, Regional Director  
First Region  
National Labor Relations Board  
Thomas P. O'Neill, Jr. Federal Building

10 Causeway Street, Sixth Floor  
Boston, MA 02222-1072

Dated at Boston, Massachusetts  
this 8th day of May, 2006.

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[1]

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3 (b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[2]

The operations supervisors are Kendra Thibodeau, Cheryl Doherty, and Dennis Richards.

[3]

The senior operations supervisors are Trudy Dunphy-Pippen and Ralph Smith.

[4]

The Petitioner does not seek to include the petitioned-for employees in the existing unit.

[5]

These two are the office assistant and the financial assistant.

[6]

These three clerical employees are Diann Carroll, the family coordinator; Rebecca Buck, the Medicaid bus pass/data entry clerk; and Faith Perkins, the billing and data specialist.

[7]

The parties stipulated that the following individuals are supervisors within the meaning of the Act and, as such, should be excluded from the bargaining unit: Jon McNulty, Executive Director; Jack DeBeradinis, Director of Finance and Administration; Cindy Gilson, Accounting and Systems Manager; Chuck Baker, Director of Services; and Vaughn Carver, Operations Manager.

[8]

McNulty testified that Kelley has been directed not to open mail that is marked as confidential on the outside of the envelope or mail from Occupational Health and Rehab. Despite this, McNulty says confidential mail could still be reviewed by Kelley, since some mail is not marked as confidential. DeBeradinis believes that there are pieces of mail he receives that are confidential and that if the Union had this information it could impede bargaining. This

information includes auditor information, grant information, and government contracts.

[9]

Kelley testified that about one year ago, McNulty asked her to place a grievance in the file cabinet, but she says that she did not read it. That was the most recent time Kelley placed a grievance in the cabinet.

[10]

Kelley testified that she locks the cabinet before she leaves at night and opens it in the morning and that it remains unlocked during the day, but she did not know of any occasion when individuals other than McNulty, DeBeradinis, or Gilson have accessed those files.

[11]

DeBeradinis says that this packet Kelley inserts into the board book containing all the board minutes, includes the monthly financial package he prepares for the board, and this report includes a narrative, income statements, balance sheets, and supporting data. He also generates a spreadsheet, which includes information on base wages broken down by job classifications, including management salaries. Although DeBeradinis looks at more detailed information when reviewing the Employer's bargaining position with the Union, since the board's role is a more general role of setting policy, the general information is in the board packet, and DeBeradinis feels if the Union had this information it would compromise the Employer's bargaining position. Kelley is the only clerical employee with access to these reports.

[12]

Kelley checks with the Registry of Motor Vehicles to make sure that each person has the proper license. Kelley also seeks a criminal records check and does background checks with the Department of Health and Human Services to make sure that none of the drivers has any adverse involvement with children who are in the care and custody of the Department of Health and Human Services. This is particularly important for this Employer in view of the population the Employer serves.

[13]

Posting a check is how Currier describes the process of hitting the computer button that releases the information she entered into the computer concerning the invoice.

[14]

454 U.S. 170 (1981).

[15]

115 NLRB 722, 724 (1956).

[16]

277 NLRB 1 (1985).

[17]

283 NLRB 999 (1987).

[18]

Supra.

[\[19\]](#)

308 NLRB 868, 877 (1992).

[\[20\]](#)

214 NLRB 762 (1974).

[\[21\]](#)

Supra at 873.

[\[22\]](#)

*Id.*.

[\[23\]](#)

*Id.* at 874.

[\[24\]](#)

316 NLRB 1211, 1213 (1995).

[\[25\]](#)

It is not clear what role Chuck Baker, director of services, plays in supervising this department.

[\[26\]](#)

The nature of how the volunteer program works and whether volunteers help run the program is vague, as is the extent to which Carver supervises the volunteer drivers.

[\[27\]](#)

Dunphy-Pippen was initially employed by the Employer as a unit driver.

[\[28\]](#)

The job descriptions are in evidence, but the evidence concerning what the operations supervisors do was sometimes different from what was described in the job descriptions.

[\[29\]](#)

Although operations supervisors do not attend management meetings, every three or four months Carver holds meetings for the operations supervisors. At these meetings, they will discuss staffing issues (do they need more drivers), on-road efficiencies, problem areas, and new “hot buttons” that the Employer is looking at. Driver performance is also discussed at these meetings, but, according to Carver, only in the general way of trying to determine why certain routes are low performing. Carver says he will place an advertisement seeking additional drivers after discussing whether there is a need to do so with the operations supervisors, and he recently hired based on this. Dunphy-Pippen testified the operations supervisors are always asking for more drivers, and sometimes drivers are hired and sometimes they are not.

[\[30\]](#)

The manifest includes the client’s name, address, where they need to be picked up, when they need to be picked up, and where they need to be dropped off.

[\[31\]](#)

The Employer starts making trips at 5:00 in the morning and continues until about 10:00 at night.

[32]

Apparently a client must schedule a trip by 9 a.m. the previous morning, although ADA passengers can schedule a trip the day before. The Employer does not provide same-day service.

[33]

The drivers' unit collective-bargaining agreement, which is not in evidence, governs who will be called in an overtime situation, as discussed below.

[34]

There is no evidence that this has happened before this season.

[35]

Dunphy-Pippen testified that the requests come to her first because, as mentioned above, she is the first one to arrive in the morning and does most of the manual scheduling that needs to be done.

[36]

If Dunphy-Pippen and Smith are out, the drivers will submit their request directly to Carver.

[37]

The form is in evidence and includes a space for the following positions to sign and approve or deny the request: supervisor, department manager/director, executive director, and payroll department. While the form in the record includes only Dunphy-Pippen's initials next to the supervisor line, the Employer agreed that this is atypical and that most of these forms are signed by all four individuals. On one of these forms, denying the request, Dunphy-Pippen initialed and dated the form and wrote too many drivers out, but there is no specific evidence concerning this request and why the other signatures do not appear on the form.

[38]

The operations supervisors have no role at all concerning requests for leave without pay, which go directly to Carver.

[39]

Dunphy-Pippen was a unit driver at the time she became an operations supervisor. When she became an operations supervisor, Dunphy-Pippen resigned from the Union, as is reflected in a note dated February 9, 1990, from her personnel file in which she stated that she had decided to accept the position of operations supervisor and wished to resign from the Union, since she had taken a "management position."

[40]

The Employer put into evidence a portion of an older Dunphy-Pippen evaluation dated September 26, 2000. In that evaluation, Dunphy-Pippen was evaluated on various skills, including decision making, which was listed under the broader category of management traits. There was no first-hand evidence offered concerning this document.

[41]

As of now, only two or three have attended the training, but all are expected to do so.

[42]

Carver testified that operations supervisors monitor the drivers' conduct while they are driving by telling the drivers to stop the chatter if there is too much chatter on the radio and to monitor whether the drivers are complying

with the Employer's rules. While, on one or two occasions, an operations supervisor may have spoken directly to an employee about a problem, such as disappearing during spare time, the evidence shows that in order for discipline to follow, the operations supervisor must go to Carver, who then addresses the matter directly with the employee, who he then may or may not discipline.

[43]

273 NLRB 1677, 1689 (1985).

[44]

175 NLRB 871 (1969).

[45]

532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

[46]

308 NLRB 101, 102 (1992).

[47]

This is very different from the facts the Court had before it in *NLRB v. Metropolitan Petroleum Co. of Massachusetts*, 506 F.2d 616 (1974), relied upon by the Employer. In *Metropolitan*, the dispatchers determined how many drivers and equipment would be needed for the day, and, in circumstances where additional hours and equipment were needed, the dispatchers could lease extra equipment and determine whether to use overtime or lease outside employees. The dispatchers could also transfer employees to do other work, if the driving was light. There was no evidence of this here. Regarding the operations supervisors' ability to transport some clients in a taxi if needed, the evidence showed the operations supervisors use common sense in making this decision, such as when no driver can get to the client. Moreover, it appears that this authority has now been somewhat circumscribed by Carver.

[48]

139 F.3d 311, 157 LRRM 2641, 2648 (2<sup>nd</sup> Cir. 1998) enfg. in part 323 NLRB 342 (1997).

[49]

308 NLRB 555 (1992).

[50]

320 NLRB 806, 811 (1996) (neither the complex nature of the task of assigning work, nor its importance to the employer is itself indicative of supervisory status when the assigning is done in a routine manner). Unlike in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), in which the Court rejected the Board's interpretation of the term "independent judgment" as distinct from professional judgment in the assignment or responsible direction of work, here, the **shipper** is not shown to be exercising judgment based on professional stature, technical expertise, or licensure. See, e.g., *American Commercial Barge Line Co.*, 337 NLRB No. 168 (2002). Moreover, the drivers in this case are directly supervised by the location operations manager, who is expected to oversee the daily activities of the drivers.

[51]

256 NLRB 1107, 1109 (1981).

[52]

The drivers are apparently told to view the operations supervisors as their immediate supervisors and to ask them questions first. There was little evidence in the record showing how the drivers and the operations supervisors



interact, however, other than the general testimony concerning the contacts they have to get the job done. The mere fact that the Employer views the operations supervisors as supervisors does not mean they are statutory supervisors within the meaning of the Act. Similarly, the fact that Dunphy-Pippen testified that she views herself as a supervisor, at least with respect to the routes, does not resolve the legal question. This is also true of Dunphy-Pippen's 1990 note and the testimony about the Union's complaint towards Cheryl Doherty.

[\[53\]](#)

242 NLRB 825, 826 (1979).

[\[54\]](#)

The fact that Dunphy-Pippen told one driver to stay home until he could reach Carver shows that it is Carver who is in charge of these decisions. While it is true that on this occasion, Dunphy-Pippen told the driver to stay home for a couple of hours until Carver could be reached, this is because Dunphy-Pippen believed the driver was obviously drunk. The Board has previously ruled that sending employees home for flagrant misconduct, such as appearing at work drunk, does not evidence supervisory status. *Wilshire at Lakewood*, 343 NLRB No. 23, fn 10 (2004), citing, *Phelps Medical Center*, 295 NLRB 486, 492 (1989).

[\[55\]](#)

Supra.

[\[56\]](#)

313 NLRB 491 (1993). This holding in *Northcrest* was unaffected by the U.S. Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 146 LRRM 2321 (1994), which held that the Board's test for determining when charge nurses are supervisors, as outlined in *Northcrest*, was inconsistent with the Act in other respects.

[\[57\]](#)

317 NLRB 1128, 1131 (1995).

[\[58\]](#)

156 NLRB 1236 (1966).

[\[59\]](#)

394 U.S. 759 (1969).

[\[60\]](#)

315 NLRB 359 (1994).